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Moving from Preparation to Perpetration? Attempted Crimes and Breach of the Peace in Scots Law

Pamela R. Ferguson*

INTRODUCTION

In a recent issue of this journal, Professor Robert Batey posed a hypothetical problem based on a scene in Saul Bellow's *Herzog*, in which the eponymous character decides to kill his ex-wife and her lover.¹ The scenario concerned Herzog's liability to be prosecuted for, inter alia, attempted murder. This paper considers the problem from the perspective of Scottish criminal law, and concludes that while the Scottish requirements for attempted crimes are more stringent than those required by the American Model Penal Code [MPC], the former does have an alternative crime, namely "breach of the peace." This crime has been used to circumvent the problem of where to draw the line between preparing to commit a crime and actually attempting to commit that crime. This paper considers whether breach of the peace could, and also whether it should, be prosecuted instead of a crime of attempt.

I. THE SCENARIO

In Batey's hypothetical, Herzog travels to the home of his ex-wife, having first obtained a loaded gun. He hides in bushes near the house and watches his former spouse and her new lover. Herzog had intended to kill the couple but changes his mind. However, he is arrested the following day when the gun is discovered on him by a police officer. Readers are to assume that a neighbor sees Herzog in the bushes and reports this to his ex-wife, who wants him to be prosecuted.² Professors Michael Cahill, William Pizzi, John Hasnas, and Gideon Yaffe each took up the challenge of responding to this scenario. Although Batey suggested several questions that might be considered to arise in this scenario, the central focus here, as in the papers of the four commentators, will be on the *actus reus* of attempted murder.

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¹ Robert Batey, *Attempt and Reckless Endangerment in Saul Bellow's Herzog*, 9 OHIO ST. J. CRIM. L. 749, 749–50 (2012).

² *Id.* at 749–50.

II. ATTEMPTS IN THE MODEL PENAL CODE

The MPC defines the actus reus of attempts as anything that constitutes a “substantial step in a course of conduct planned to culminate in his commission of the crime,” and specifies a list of behavior which, if it “strongly corroborates” the actor’s criminal purpose, could be held to be sufficient (or, in the wording of the section, “shall not be held insufficient as a matter of law”) to constitute an attempt.³ These include lying in wait; searching for or following the contemplated victim of the crime; enticing or seeking to entice the intended victim to go to the place contemplated for the crime’s commission; reconnoitering or unlawfully entering a structure, vehicle, or enclosure in which the crime is to be committed; and possessing materials to be used in the crime.⁴

Analyzing the scenario, Cahill doubts whether Herzog’s behavior is “strongly corroborative” of an intention to kill, since he was driven to spy on the house from a variety of complex reasons.⁵ This is an issue of sufficiency of evidence; in order to focus on the actus reus of attempted murder, we need to assume that there was adequate evidence of mens rea (perhaps Herzog tells the police officer “I came to Chicago to kill them both”). Cahill accepts that Herzog’s conduct corresponds to “lying in wait” or “reconnoitering” the scene, and thus is sufficient to constitute a substantial step that amounts to the actus reus of attempted murder. However, he concludes that prosecution would be unwise due to the likelihood of Herzog establishing the abandonment defense provided by the MPC,⁶ since he changed his mind about killing the couple. Pizzi likewise concludes that there would be enough “to take this case to the jury”⁷ for attempted murder, but he too ultimately concludes that conviction for attempted murder is unlikely due to abandonment.

In respect of whether a prosecutor could properly charge attempted murder in these circumstances, Hasnas states, “the answer would clearly be ‘yes.’”⁸ He points out, however, that the actual question posed by Batey is not whether Herzog *could*, but rather whether he *should*, be so charged,⁹ and argues that he should not—on the ground that, in his view, the MPC recognizes attempted crimes at too early a stage.¹⁰ Yaffe also concludes that “[Herzog] has attempted murder” but

³ MODEL PENAL CODE §§ 5.01(1), (2) (1985).

⁴ *Id.* at § 5.01(2).

⁵ Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 752 (2012).

⁶ MODEL PENAL CODE § 5.01(4) (1985).

⁷ William T. Pizzi, *Rethinking Attempt Under the Model Penal Code*, 9 OHIO ST. J. CRIM. L. 771, 772–73 (2012).

⁸ John Hasnas, *Attempt, Preparation, and Harm: The Case of the Jealous Ex-Husband*, 9 OHIO ST. J. CRIM. L. 761, 761 (2012).

⁹ Batey, *supra* note 1, at 749 (posing the question: “Should the local prosecutor charge him for [the] attempted murder . . . ?”).

¹⁰ *Id.*

argues that the subsequent abandonment should lead to a reduced sentence.¹¹ Thus, while their views differ as to whether abandonment ought to provide a complete defense, and some favor an alternative approach to attempts from that taken by the MPC, none of the commentators doubts that, as a matter of strict law, Herzog has committed attempted murder. This conclusion comes as a surprise to the Scottish reader. There is little doubt that Herzog could *not* be prosecuted for attempted murder had Bellow's scenario been set in Scotland.

III. SCOTTISH LAW

The mens rea for attempted crimes in Scots law is generally the same as for completed crimes, insofar as only crimes of intent can be attempted.¹² It is of course very difficult to know what a person intended, particularly where that intention did not come to fruition. In respect of the actus reus, the law distinguishes between acts which constitute attempts to commit a crime, and acts which are regarded as merely preparatory to such an attempt, since generally only the former attract criminal liability.¹³ In order to constitute a criminal attempt, the accused must be actually perpetrating the crime. Where the line should be drawn between mere preparation and actual perpetration is treated as a matter of fact, and is thus for the trial judge (in summary cases) or the jury (in cases prosecuted on indictment under solemn procedure) to determine. It is unclear whether the abandonment defense is recognized in Scots law; while the leading work argues that it would be unjust if the law did not take account of an accused's change of heart, there is no authority on the point.¹⁴

The leading Scottish case of attempt liability is *H. M. Advocate v. Camerons*,¹⁵ decided in 1911, in which the accused were spouses who were prosecuted for attempting to defraud an insurance company. Cecil and Ruby Cameron staged a fake robbery and reported the theft to their insurance broker, but the prosecution failed to establish that they had made a claim against the insurance company itself. The trial judge, Lord Justice-General Dunedin, directed the jury that what was at issue was the need to determine "where preparation ends and perpetration begins. In other words, it is a question of degree, and when it is a

¹¹ Gideon Yaffe, *Attempt, Risk-Creation, and Change of Mind: Reflections on Herzog*, 9 OHIO ST. J. CRIM. L. 779, 779–87 (2012).

¹² *Cawthorne v. H. M. Advocate*, (1968) J.C. 32 (Scot.); see also 1 GERALD H. GORDON, THE CRIMINAL LAW OF SCOTLAND 6.67 (Michael G.A. Christie ed., 2000).

¹³ An exception is the crime of conspiracy which is committed as soon as the protagonists agree to commit a crime. Preparations need have progressed no further than the bare agreement. Conspiracy requires at least two people to form such an agreement, thus it has no application to the *Herzog* scenario. *Id.*

¹⁴ *Id.* at 6.30.

¹⁵ *H. M. Advocate v. Camerons*, (1911) S.C. (J.) 110 (Scot.).

question of degree it is a jury question.”¹⁶ The couple were convicted of attempted fraud. In *Docherty v. Brown*¹⁷ the appeal court reiterated:

[F]or a relevant charge of an attempt to commit a crime, it must be averred that the accused has the necessary *mens rea*, and that he has done some positive act towards executing his purpose, that is to say that he has done something which amounts to perpetration rather than mere preparation.¹⁸

A similar test was employed in *Ford v. H. M. Advocate*,¹⁹ in which the appeal court stated the requirements for attempted rape as being that the accused had the intention of having sexual intercourse with the complainer (i.e. the alleged victim) forcibly and against her will (which was the common law definition of rape),²⁰ and that he “engaged in conduct which passed from the stage of preparation [for the crime] into the stage of perpetration of the crime.”²¹

A slightly different and statutory example is provided by the Criminal Law (Consolidation) (Scotland) Act 1995 which makes it an offense to “attempt[] to enter” a sports ground while drunk.²² What constitutes such an attempt was at issue in the case of *Barrett v. Allan*.²³ The police observed the accused, who was drunk, as he stood in the queue at a turnstile entrance to a football stadium. He was warned not to enter, and he then turned away. However, he returned a few minutes later and re-joined the queue. When he was some eighty to one hundred yards and around the corner from the turnstile,²⁴ he was arrested, at which point he stated, “I’m no [i.e. not] that drunk. I’m going in.” This established that his intention was to enter the grounds, but did his behavior constitute the *actus reus* of

¹⁶ *Id.* at 114. The Lord Justice-General is Scotland’s most senior criminal judicial post.

¹⁷ *Docherty v. Brown*, (1996) J.C. 48 (Scot.).

¹⁸ *Id.* at 60 (opinion of Lord Justice-Clerk Ross). The Lord Justice-Clerk is Scotland’s second most senior criminal judicial post.

¹⁹ *Ford v. H. M. Advocate*, (2001) Scot (D) 31/10 (Scot.).

²⁰ Rape has since been redefined by statute as sexual intercourse without consent, rather than against the will of the complainer. See Sexual Offences (Scotland) Act 2009, § 1.

²¹ *Ford*, (2001) Scot (D) 31/10 at 13 (opinion of Lord Nimmo Smith) (The victim testified that the accused had, *inter alia*, placed his naked penis between her legs.).

²² Criminal Law (Consolidation) (Scotland) Act 1995, § 20(7). At the time of *Barrett v. Allan*, (1986) S.C.C.R. 479 (Scot.), discussed below, the prohibition was contained in the Criminal Justice (Scotland) Act 1980, § 74(b): “Any person who . . . while drunk, attempts to enter, the relevant area of a designated sports ground at any time during the period of a designated sporting event shall be guilty of an offence” This was repealed by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, Sched. 5, and re-enacted, using the same wording, in § 20(7).

²³ *Barrett v. Allan*, (1986) S.C.C.R. 479 (Scot.).

²⁴ *Id.* at 482 (opinion of Lord Justice-General Emslie) (finding in fact 4 of the trial judge).

attempting to enter the grounds? The sheriff who heard the case at first instance noted in his report for the appeal court:

It would be a crushing absurdity, and is not seriously otherwise suggested, to suppose that the appellant was at the locus with any purpose other than, in everyday language, going to see the game. Whether or not he was attempting to enter [the football ground] for the purposes of the Act, however, is not a question necessarily resolved by that fact alone.²⁵

He took the view that there were “two limiting cases”: a drunk person who actually reached the turnstiles and was attempting to force entry would clearly contravene the legislation. At the other end of the spectrum, a Glaswegian such as the appellant who had the clear purpose of going to see the football match in Edinburgh, but who had got no further than the main Glasgow railway station some fifty miles away could not “by any stretch of the imagination[] be said to be attempting to enter” the Edinburgh stadium for the purpose of the statute. He continued:

It therefore seems to me that what is really at issue is the question of how far a person’s general purpose of going to watch a match has crystallised, by his own actings, so far and so materially as to bring him within the ambit of the section. If I am right in that approach, then that seems to lead in turn to two further questions. First, can it be said that any person who has . . . not actually gained the turnstiles to the ground and who is attempting to pass into the ground from outside, could ever be said under the section to be attempting to enter the ground? My answer to that question is and can be nothing other than intuitive, but is in the affirmative. If I be so far right, one then has to consider at what point on the infinite gradations between the two limiting cases to which I have referred did the appellant become, so to speak, a transgressor. Again, I think that the answer to that question can only be intuitive and a matter of impression and degree. On the bases which I have outlined I thought that the appellant, having the purpose of entering [the stadium] and being part of a queue of persons with that common purpose and being some hundred yards from the entrance to the ground, was a person who had thereby so far actualised his general purpose as to bring him within the scope of the section and I convicted him accordingly.²⁶

²⁵ *Id.* at 479 (Sheriff Hyslop). Sheriffs are legally qualified judges who preside over the Sheriff Courts in Scotland. Such courts can hear cases under both summary procedure (as in this case, where the sheriff is the trier of facts) and solemn procedure (where there is a jury of fifteen lay people).

²⁶ *Id.* at 479–80.

On appeal, counsel for the appellant argued that the facts demonstrated that the appellant had conceived a firm intention of entering the sports ground, but had not begun to attempt to enter it. However, the High Court of Justiciary, sitting as a court of appeal, found that the sheriff had been entitled to find that the accused's acts had been "more than preparatory" and upheld the conviction.²⁷

Despite "preparation" and "perpetration" being referred to by the appeal court as "the classic terms used in identifying the offence of attempt,"²⁸ this distinction has been criticized as being "meaningless," "vague," and "unsatisfactory."²⁹ Drawing the line between preparation and perpetration may be difficult, but, as *Barrett v. Allan* illustrates, the test has proven sufficiently flexible to allow the accused to be convicted of at least some attempted crimes prior to the point at which one might colloquially say that they were "actually perpetrating" the crime. Nevertheless, the MPC's extended definition is much broader than that adopted in Scots law; a person who lay in wait for or followed his intended victim, or who reconnoitered the place of the intended crime, would be unlikely to be found by a judge or jury to have gone far enough to be said to have moved from preparation to actual perpetration. Thus, while Professor Yaffe points out that under the MPC, "Herzog has attempted murder merely by peering in a window,"³⁰ it is difficult to believe that any fact-finder would conclude that this constituted attempted murder in Scots law.

Professor Hasnas cites the case of *McQuirter v. State*,³¹ in which "an African American was convicted of attempted assault with intent to rape for walking down the street behind a white woman on the basis of highly suspect evidence of what he was thinking."³² This must be seen in the context of the date (1953) and the state (Alabama) and may be doubtful precedent for the twenty-first century even in that state. There is, however, little doubt that such behavior could not amount to an attempt at any offense against the person in Scots law. This is illustrated by the case of *H. M. Advocate v. Forbes*.³³ The indictment³⁴ against Forbes alleged that:

[Y]ou did climb a drainpipe and break into the first floor flat there occupied by, *inter alia* [J.M.], aged 14 years, while in possession of a tube of cream, and did remove your clothing with the exception of a pair of boxer shorts, prowl around said flat, remove articles from a chest of

²⁷ The High Court of Justiciary is Scotland's highest domestic criminal court.

²⁸ *Hamilton v. Vannet*, (1999) G.W.D. 8-406.

²⁹ GORDON, *supra* note 12, at 6.26.

³⁰ Yaffe, *supra* note 11, at 787.

³¹ *McQuirter v. State*, 63 So. 2d 388 (Ala. Ct. App. 1953).

³² Hasnas, *supra* note 8, at 766.

³³ *H. M. Advocate v. Forbes*, (1994) J.C. 71 (Scot.).

³⁴ In Scottish solemn cases, the charges are specified on an "indictment." In summary proceedings, the charges are specified on a "complaint."

drawers in a bedroom, cut holes in a sweatshirt and fashion it in the manner of a hood, all with intent to assault and rape said [J.M.].³⁵

There seems little doubt that such behavior could be described as a “substantial step” in the commission of the crime of rape under the MPC; it was averred that the accused had unlawfully entered the building, and was in possession of materials to be used in committing the crime. Likewise, in the English case of *R. v. Tothill*,³⁶ the accused was convicted of “attempted burglary with intent to rape” based on evidence that he had knocked on the door of a house, intending to rape the woman who lived there. English law employs a similar definition of attempted crime to that of Scots law; it is an attempt for someone to do an act “which is *more than merely preparatory*” to commission of the completed crime.³⁷ The Court of Appeal in *Tothill* stated that:

[T]he crucial step that this appellant took, as it seems to us, is that he knocked at the door. By so doing, in our judgment, he moved from the preparatory to the executory stage of his plan.³⁸

The indictment in *Forbes* alleged a course of conduct which went further than that in *Tothill*: far from merely knocking on a door, Forbes was alleged to have broken into the flat, undressed, and fashioned a mask from the victim’s own clothing. As with *Tothill*, the prosecution intended to show that his intention was to commit rape. By contrast with *Tothill*, however, the sheriff in *Forbes* upheld a plea taken by the defense to the relevancy of the charge³⁹ on the basis that there was no crime in Scots law of breaking into premises with intent to assault and rape. The Solicitor-General for Scotland, who represented the prosecution at the appeal, did not attempt to persuade the High Court that the facts specified constituted attempted rape, nor did he suggest that the charge be amended to that effect.⁴⁰ Had he attempted to do so, it is unlikely that the Court would have acceded to this. In Scots law, attempted rape requires an accused person to have actually tried to achieve sexual penetration, and the indictment in *Forbes* narrated acts which fell short of this.⁴¹ The Court did, however, note:

³⁵ *Forbes*, (1994) J.C. 71 at 71.

³⁶ *R. v. Tothill*, [1998] C.A. (Crim) (unreported) (Eng.); *but see* [1998] CRIM. L. R. 876; ALL ENGLAND TRANSCRIPTS (1997–2008), available online in *Lexis Library*.

³⁷ Criminal Attempts Act 1981, c. 47 § 1(1) (Eng.) (emphasis added).

³⁸ *See* [1998] CRIM. L. R. 876 (opinion of Wright, J.).

³⁹ This is a preliminary plea in bar of trial on the ground that the indictment or complaint revealed no crime known to the law of Scotland.

⁴⁰ The Solicitor General is the second most senior Law Officer in Scotland, the most senior being the Lord Advocate. The Law Officers rarely appear in person in court, indicating that this appeal was regarded as one of considerable importance to the prosecution.

⁴¹ The editor of *The Criminal Law of Scotland* reached the same conclusion: “Given what the accused was alleged to have done in the premises . . . it was impossible to conclude on any plausible

There is no dispute that what the [accused] is said to have done, by breaking into the flat and doing the various things which he is said to have done there, constituted a breach of the peace.⁴²

IV. BREACH OF THE PEACE

Unlike many countries, including Canada and England, where breaching the peace gives the police power to effect an arrest but is not a crime per se, in Scotland, breach of the peace is a crime in its own right.⁴³ Typically, the charge alleges that, “you, [name of accused] did conduct yourself in a disorderly manner, did [shout and swear/challenge others to fight, etc.] and did commit a breach of the peace.” It is, however, notoriously vague. In the leading case of *Smith v. Donnelly*,⁴⁴ the High Court defined breach of the peace as being committed when conduct is “severe enough to cause alarm to ordinary people and threaten serious disturbance to the community.”⁴⁵ This definition is far from satisfactory: what does it mean for conduct to be “severe”? What is meant by the “ordinary person”? In practice, the need for severe conduct means little more than that it must not be conduct of an extremely trivial nature, and the “ordinary” person is equated to the hypothetical “reasonable person.” Where, however, the accused’s behavior is deemed by the court to be sufficiently flagrant, no members of the public need have been disturbed, and indeed none need actually to have been present; it is sufficient that the court takes the view that the behavior *would have caused* serious disturbance if members of the community had in fact been present.

The range of behaviors to which this one crime has been applied is very broad indeed and includes, inter alia, such diverse types of conduct as fighting,⁴⁶ shouting and swearing;⁴⁷ abusing solvents;⁴⁸ discharging a firearm;⁴⁹ threatening

theory that the stage of attempted rape had been reached.” GORDON, *supra* note 12, at 6.10. For a critique of the *Forbes* case, see PAMELA R. FERGUSON & CLAIRE MCDIARMID, *SCOTS CRIMINAL LAW: A CRITICAL ANALYSIS* ¶¶ 12.11.2–12.11.3 (2009).

⁴² H. M. Advocate v. Forbes, (1994) J.C. 71, 75–76 (Scot.) (opinion of Lord Justice-General Hope).

⁴³ In respect of Canadian law, see Jackie Esmonde, *The Policing of Dissent: The Use of Breach of the Peace Arrests at Political Demonstrations*, 1 J.L. & EQUALITY 246 (2002). For a discussion on English law, see Glanville L. Williams, *Arrest for Breach of the Peace*, CRIM. L. REV. 578 (1954).

⁴⁴ *Smith v. Donnelly*, (2002) J.C. 65 (Scot.).

⁴⁵ *Id.* at 71.

⁴⁶ *Donnelly v. H. M. Advocate*, (2007) HCJAC 59 (Scot.). Numerous cases could be cited for each example on this list, but one case has been chosen in each respect to serve as an illustration. For further discussion, see FERGUSON & MCDIARMID, *supra* note 41.

⁴⁷ *Hunter v. Cottam*, (2011) S.C.C.R. 130 (Scot.).

⁴⁸ *Taylor v. Hamilton*, (1984) S.C.C.R. 393 (Scot.).

⁴⁹ *H. M. Advocate v. McGovern*, (2007) HCJAC 21 (Scot.).

or attempting to commit suicide;⁵⁰ throwing a lit firework in a bus;⁵¹ aggressively begging for money;⁵² indecent exposure;⁵³ and making threatening phone calls.⁵⁴ Although the facts alleged in *Forbes* were held to constitute a breach of the peace, the court also held that the averment that this was done “with intent to assault and rape” had to be deleted from the charge:

[T]he effect of [the accused’s] conduct must be judged by what he did or by what he said, not by reference to his state of mind or his intention or to things that he has not yet done. The concluding words of this charge refer to acts which the respondent had not yet committed but was intending to commit In our opinion these words have no place in a charge of breach of the peace⁵⁵

The case was remitted back to the Sheriff Court so that the prosecution could amend the charge to breach of the peace, under deletion of the reference to the accused’s intentions.

It is apparent that this is a very useful crime for a prosecutor, though it raises human rights and “fair labelling” issues.⁵⁶ Its relevance to the *Herzog* scenario is that breach of the peace has been prosecuted where the accused had not reached the stage of attempting to commit a different crime. As in *Forbes*, such cases often involve sexual misconduct. In *Kearney v. Ramage*,⁵⁷ the charge alleged:

[Y]ou . . . did conduct yourself in a disorderly manner approach [two girls who suffered from learning difficulties and attended a special school] seize [one complainer] by the hand, refuse to release her hand, utter sexually explicit comments, invite [them] to attend at a house with you, place them in a state of fear and alarm and commit a breach of the peace.⁵⁸

⁵⁰ *Torbet v. H. M. Advocate*, (1998) S.C.C.R. 546 (Scot.).

⁵¹ *McLean v. McNaughton*, (1984) S.C.C.R. 319 (Scot.).

⁵² *Wyness v. Lockhart*, (1992) S.C.C.R. 808 (Scot.). Note that this requires to be done in an a fashion which is liable to cause alarm; begging is not a breach of the peace, as such. See *Donaldson v. Vannet*, (1998) S.L.T. 957 (Scot.).

⁵³ *Heatherall v. McGowan*, (2012) HCJAC 25 (Scot.).

⁵⁴ *Robertson v. Vannet*, (1999) S.L.T. 1081 (Scot.).

⁵⁵ *H. M. Advocate v. Forbes*, (1994) J.C. 71, 76 (Scot.) (opinion of Lord Hope).

⁵⁶ Article 7 of the European Convention on Human Rights has been interpreted to require crimes to be defined with precision.

⁵⁷ (2007) S.C.C.R. 35. (Scot.).

⁵⁸ *Id.* at 36.

Likewise, in *LBM v. H. M. Advocate*⁵⁹ the appellant pleaded guilty to a breach of the peace, in which the indictment stated that he engaged two school girls aged ten and eleven in conversation, asked them if he could tickle their legs, attempted to entice them into a car, and placed them in a state of fear and alarm.⁶⁰ Since the list of conduct which may constitute a “substantial step” in § 5.01(2) of the MPC includes “enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission,” it seems that had these cases occurred in states which have adopted the MPC, the accused could have been charged with an attempted crime (presumably attempted sexual assault). In Scotland, since neither Kearney nor LBM had progressed from preparing to commit sexual assault to actually perpetrating that assault, the only charge that could be prosecuted was breach of the peace.

Charging breach of the peace for behaviors that might in other jurisdictions be characterized as an attempted offense against the person has not always been a successful strategy for the Scottish prosecution. In *H. M. Advocate v. Greig*⁶¹ the charge narrated:

[H]aving been placed on the sex offenders register for life . . . for offences of lewd and libidinous practices⁶² against young children, [you] did conduct yourself in a disorderly manner and knowing that there was likely to be a large number of children at a fireworks display there, dress yourself in such a manner as to be easily mistaken for a steward or first aid officer, position yourself adjacent to all the public facilities there, place a police officer who was in attendance at said event, to whom you are known and who was aware of the conviction aforesaid, in a state of fear and alarm for the safety of children and the public and did commit a breach of the peace.⁶³

A plea to the relevancy of the charge⁶⁴ was upheld by the trial judge, who noted:

Going to a fireworks display in a public park, dressing oneself in a manner as to be easily mistaken for a steward or first aid officer and standing near the toilets, which seems to me to be the specification of the

⁵⁹ (2011) HCJAC 96 (Scot.). The appeal related to the sentence only.

⁶⁰ See also *Jude v. H. M. Advocate*, (2012) HCJAC 65 (Scot.). As well as six charges of sexual assault, the appellant was also charged with breach of the peace for having hidden a camera in the victim’s bathroom with a view to taking indecent photographs of her. In the event, his plea to not guilty on this charge was accepted by the prosecution during the trial.

⁶¹ (2005) S.C.C.R. 465 (Scot.).

⁶² These are common law crimes in Scotland.

⁶³ *Id.* at 466.

⁶⁴ See, *supra* note 39 and accompanying text.

overt conduct said to comprise this breach of the peace, does not in my opinion meet the requirements of being ‘flagrant’ on the hypothesis that, apart from the police officer with his special knowledge, no ordinary reasonable person was actually alarmed, nor does it appear to me to be conduct which presents as genuinely alarming and disturbing in its context to any reasonable person, if one excludes from that reasonable person the background knowledge possessed by the particular police officer.⁶⁵

The prosecution abandoned its appeal in that case, but, in *H. M. Advocate v. Murray*,⁶⁶ it again libelled a breach of the peace, which included reference to a previous conviction:

[H]aving been convicted after trial on a charge of assault to severe injury and danger of life, having assaulted a 13-year-old boy by striking him with a hammer and burying him in a shallow grave and having been sentenced to eight years detention in a young offender's institute [sic]⁶⁷ . . . [you did] . . . conduct yourself in a disorderly manner, state to [a social worker] . . . that you had been recently in possession of a hammer while behaving in a manner which may lead police officers to search you and with the intention of assaulting said police officers with said hammer, display a hammer to him and thereafter threaten to sexually assault and murder a child, further state that while in an area in Falkirk to the prosecutor unknown, you had seen a boy of 11–12 years whom you considered to be a possible victim and that said crime would be committed at a distance from your home, that you would dig the grave deep and in doing this you would avoid detection and prosecution for said crime and you did place said [social worker] in a state of fear and alarm for the safety of the lieges and you did commit a breach of the peace.⁶⁸

A second charge was in broadly similar terms. The sheriff upheld a challenge to these charges on the basis that they breached statutory prohibitions on an accused person's previous convictions being revealed prior to trial.⁶⁹ It is apparent, therefore, that there are limits on the extent to which breach of the peace can be charged as an alternative to a crime of attempted sexual assault. Nevertheless, it has proved a useful crime for the prosecution in cases in which the

⁶⁵ *H. M. Advocate v. Greig*, (2005) S.C.C.R. 465, 471–72 (Scot.).

⁶⁶ *H. M. Advocate v. Murray*, (2007) S.C.C.R. 271 (Scot.).

⁶⁷ The correct term is “young offender institution.”

⁶⁸ *Murray*, (2007) S.C.C.R. at 272.

⁶⁹ This is prohibited by the Criminal Procedure (Scotland) Act 1995, § 101.

accused is still at the stage of preparing to commit sexual assault but has not taken sufficient steps to be said to have been perpetrating the crime. It will be recalled that in the *Herzog* scenario, commentators were asked to assume that a neighbor saw Herzog in the bushes and reported this to his ex-wife. It is reasonable to assume that the neighbor would be alarmed or disturbed by this behavior; even if this was not the case, the ex-wife was certainly alarmed/disturbed since she reported the matter to the police. In such circumstances, although a Scottish Herzog could not be charged with attempted murder, or any other attempted offense against the person, he would likely be prosecuted for breach of the peace.

V. A CRITIQUE

Reflecting on the *Herzog* commentaries has led me to question whether this is a satisfactory state of affairs so far as Scots law is concerned. I sometimes pose my own hypothetical to my criminal law students:

Suppose that on Monday *A* makes the decision to murder *B* later that week. On Tuesday, *A* buys a gun, and on Wednesday she buys ammunition. On Thursday she stakes out the victim's house and notes his routine. At 3.30 p.m. on Friday, *A* sees her target walking his dog. At 3.40 p.m. *A* takes out the gun. She loads it at 3.45 p.m., and aims carefully at the victim. At 3.47 p.m. she fires the gun. At what stage is *A* guilty of attempted murder? . . . Should *A* be charged with attempted murder the moment she gets into her car? Or when she sees the victim? When she takes out the gun? Or when she loads it? Does she attempt murder when she aims the loaded gun at the victim? Or do we need to go one step further and say that it is not attempted murder until *A* pulls the trigger?⁷⁰

The English case of *R. v. Jones*⁷¹ involved a similar scenario. Jones intended to murder his victim so he purchased a shotgun, shortened its barrel, and planned to escape to Spain following the killing. He took the gun and some Spanish currency and put on a disguise. He lay in wait for his victim, who was driving a car. Jones waited until the car stopped then jumped into the backseat and pointed the gun at the victim. The victim managed to grab the gun and to escape. Convicted of attempted murder, Jones appealed on the basis that since it had not been established that the gun's safety catch was off, or that his finger had been on the trigger, it had not been proven that he had attempted to commit murder. Dismissing his appeal, the court stated:

⁷⁰ See also FERGUSON & MCDIARMID, *supra* note 41, at ¶ 8.2.3.

⁷¹ [1990] 1 W.L.R. 1057 (Eng.). For a critique of this case, see Glanville Williams, *Wrong Turnings on the Law of Attempts*, CRIM. L. REV. 416, 418 (1991). This is discussed further, below.

Clearly his actions in obtaining the gun, in shortening it, in loading it, in putting on his disguise, and in going to the school could only be regarded as preparatory acts. But, in our judgment, once he had got into the car, taken out the loaded gun and pointed it at the victim with the intention of killing him, there was sufficient evidence for the consideration of the jury It was a matter for them to decide whether they were sure those acts were more than merely preparatory.⁷²

In relation to my scenario, if asked to suggest when *A* ought to be regarded as having attempted to kill her victim, the majority of students plump for when the gun is loaded, or aimed at the victim, or when it is actually fired. However, a small minority see little problem in opting for an earlier point, in some cases as far back as Tuesday—after all, they argue, we are told that *A* has decided to murder someone, and on Tuesday she begins to implement her plan. They recognize the practical problems involved in the prosecution regarding being able to prove what *A* had decided at this early stage. But what if *A* confides to a friend, “I’ve finally decided. I’m going to kill *B* this week”? If we can prove that *A* resolved to kill and did *something* in furtherance of that resolve, then for some students *A* should be regarded as guilty of attempted murder at that point. For most people, however, this does not seem just. As Professor William Wilson has argued:

Penal policy must in such cases be able to reconcile its retributive and preventative functions. Clearly it is better for harm to be prevented but there must nevertheless be a critical point before which official intervention is discounted to reflect the law’s overriding commitment to freedom and autonomy, displayed in such features as the presumption of innocence and the act requirement. The overriding concern here, therefore, is to devise a secure benchmark for when the criminal attempt actually begins.⁷³

Thus, it is important that a legal system does not hold a person liable for attempting a crime at too early a stage.

It may be argued that the Scottish common law breach of the peace has proved to be a flexible and useful crime; it makes it likely that people like Herzog are convicted in circumstances where they have acted in a wrongful and potentially harmful manner. It would be ridiculous if a police officer who spotted him lurking in the bushes had to wait until he actually pointed the gun at one of his intended victims—or worse still, actually fired the gun—before being able to intervene. Breach of the peace allows the accused to be arrested, prosecuted, convicted and punished for contravening the law, at an early stage in the commission of a crime. On the other hand, it may be argued that this approach fails to correctly identify

⁷² R v. Jones, [1990] 1 W.L.R. at 1062–63.

⁷³ WILLIAM WILSON, CENTRAL ISSUES IN CRIMINAL THEORY 231 (2002).

what it is that the accused has done which is reprehensible. The wrongful behavior in *Forbes*, *Ramage*, *LBM*, *Greig*, or *Murray* is not primarily that it caused or was likely to cause a “disturbance to the community” or a “public disorder,” which is of the essence of the crime of breach of the peace.

Professor Glanville Williams recommended several years ago that English Law should adopt the “substantial step” test of the MPC.⁷⁴ In respect to the *Jones* case, Williams questioned why lying in wait for one’s victim, or even earlier conduct such as buying the shotgun or shortening it, is regarded by the law as insufficient to form the actus reus for an attempted murder if there is sufficient evidence of intention to kill. Reflecting on the *Herzog* scenario, I suggest that Scots law ought to do likewise.⁷⁵ *Forbes*’ alleged behavior merits condemnation and punishment because he not only intended to commit rape, but also took substantial steps towards fulfilling this intention. Similarly in *Kearney v. Ramage* and *LBM*, it is what the accused intended to do in each of these cases had he succeeded in persuading these young girls to accompany him, which constitutes the wrongful behavior which we condemn. The reason our blood runs cold when reading the indictment in *Greig* has little to do with the averment that the accused attended a firework display dressed as a first aid officer, and everything to do with the fact that the accused was a known pedophile and the circumstances libelled strongly suggest that this act of deception was an important step in his plan to sexually assault a child. We may be somewhat concerned by the allegation in *Murray* that the accused caused alarm and upset to his social workers, but we are much more concerned that a man who had seriously injured a child in the past was, by his own admission, planning to commit a similar offense in the near future. Whether *Murray* should be convicted of attempted murder should depend on whether there was evidence that he had taken a substantial step towards commission of this crime. Revealing his plans to social workers may not be sufficient, but evidence that he had indeed identified a potential victim could well be enough here. That the substantial steps taken by an accused fell short of the completed crime should be a factor in determining the appropriate sentence, but ought not prevent conviction for a criminal attempt. Amendment of Scots law to redefine attempted crimes in this way would obviate the need for the prosecution to expand breach of the peace beyond its legitimate boundaries as an essentially public order crime.

⁷⁴ Williams, *supra* note 71, at 420–22.

⁷⁵ This ought to be coupled with allowing “abandonment” to mitigate sentence; further discussion of this issue is beyond the scope of the current paper.